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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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LESLIE BROWAND,

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Plaintiff,

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v.

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ERICSSON INC., et al.,

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Defendants.

Case No. [18-cv-02380-EMC](#)

**ORDER REMANDING CASE AND  
DENYING DEFENDANTS' MOTION  
TO DISMISS AS MOOT**

Docket No. 13, 19

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Plaintiff Leslie Browand sued Defendants Ericsson, Inc., EUS, Inc., Sanuj Pachouri, and Does 1-100 in state court for allegedly discharging her on the basis of her gender and in retaliation for whistleblowing activities. After Defendants removed the case to federal court, the Court issued an order to show cause why the case should not be remanded for lack of federal subject matter jurisdiction. For the reasons explained below, the case is **REMANDED**.

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**I. FACTUAL AND PROCEDURAL HISTORY**

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The Court relies on the allegations in Plaintiff's original complaint because it is the operative version for removal analysis. *See Abada v. Charles Schwab & Co.*, 300 F.3d 1112, 1117 (9th Cir. 2002).

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Plaintiff was an "Instruction Manager – Level 3" at Ericsson, Inc. from March 2013 through September 7, 2017, when Ericsson terminated her employment via layoff. *See Compl.* at ¶¶ 11, 21. Plaintiff claims that Defendants discriminated against her based on her age and gender (she is over 40 and female) in violation of California's Fair Employment and Housing Act (FEHA), wrongfully terminated her in violation of public policy, retaliated against her for whistleblowing under California Labor Code § 1102.5, invaded her privacy, misrepresented her employment status, and intentionally inflicted emotional distress on her. *Id.* at ¶ 1.

1 Plaintiff alleges that, before her layoff, Ericsson engaged in fraudulent practices and that  
2 she criticized these practices within the company. *Id.* at ¶¶ 18-19. Specifically, Plaintiff alleges  
3 Defendant Sanuj Pachouri, her manager, instructed her team to work on projects before finalizing  
4 a purchase order or other written agreement with their customer, Verizon. *Id.* at ¶ 12. Due to this  
5 practice, Plaintiff and other employees were unable to bill some of their time working on  
6 Verizon's projects. *Id.* at ¶ 13. Plaintiff and other employees were also told not to bill their  
7 overtime work on these projects. *Id.* at ¶ 14.

8 According to Plaintiff, these practices gave the false appearance that projects cost less to  
9 Ericsson than they actually did. *Id.* Vice Presidents were awarded bonuses for these under-budget  
10 projects and Ericsson then paid them bonuses they did not truly earn. *Id.* As a result of these  
11 practices, shareholders were provided with false information about the company's financials. *Id.*  
12 at ¶ 18. During her last six months of employment, Plaintiff states she was a vocal critic of these  
13 accounting irregularities: she "spoke out in meetings, complained directly to Defendant Pachouri,  
14 raised [the issue] repeatedly with her project manager and reported her concerns in writing in  
15 her . . . review." *Id.* at ¶ 19.

16 As a result, Plaintiff alleges she suffered "harassment, discrimination, and retaliation." *Id.*  
17 at ¶ 20. Specifically, Plaintiff alleges that she was removed "from the organizational chart during  
18 her medical leave," false comments were entered on her performance review, Pachouri refused to  
19 shake her hand when shaking other people's hands, refused to contact her, "engaged in rude,  
20 bullying behavior toward Plaintiff and other females," excluded her from work events, offered  
21 trainings to males that were not offered to females, gave male employees raises but not female  
22 employees, created opportunities for male employees and not female employees, allowed male  
23 employees to deal drugs at work, and engaged in other kinds of special treatment toward male  
24 employees. *Id.* Plaintiff alleges that she was harassed in a "despicable and outrageous" manner.  
25 *Id.* at ¶ 48.

26 **II. LEGAL STANDARD**

27 Defendants bear the burden of establishing federal subject matter jurisdiction. *See*  
28 *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1195 (9th Cir.1988). This burden is substantial: the

1 removal statute is “strictly construed against removal jurisdiction and any doubt is resolved in  
2 favor of remand.” *Plute v. Roadway Package Sys., Inc.*, 141 F. Supp. 2d 1005, 1007 (N.D. Cal.  
3 2001) (citing *Boggs v. Lewis*, 863 F.2d 662, 663 (9th Cir. 1988)).

### 4                   **III. DISCUSSION**

5                   Defendants removed on the basis of federal question and diversity jurisdiction. *See* Notice  
6 of Removal at ¶¶ 4, 9. The Court analyzes each basis for jurisdiction in turn.

#### 7                   A. Federal Question Jurisdiction

8                   In her Complaint, Plaintiff brings only state law causes of action. Compl. at ¶ 1.  
9 Defendants claim two of Plaintiff’s state law claims raise a federal question: wrongful termination  
10 in violation of federal public policy and violation of California Labor Code Section 1102.5. Resp.  
11 to Order to Show Cause at ¶ 4. Plaintiff asserts two public policy bases for both claims: retaliation  
12 for protected activity under Sarbanes-Oxley (SOX), a federal statute, and discrimination contrary  
13 to California’s Fair Employment and Housing Act (FEHA). Compl. at ¶¶ 29, 34. Defendants  
14 allege that these Causes of Action necessarily and substantially rely on interpreting the  
15 requirements of SOX, creating federal question jurisdiction over Plaintiff’s claims. Resp. to Order  
16 to Show Cause at 5.

17                   In a recent case, *Gunn v. Minton*, the Supreme Court summarized the test for federal  
18 question jurisdiction when only state law causes of action are asserted:

19                   [F]ederal jurisdiction over a state law claim will lie if a federal issue  
20 is: (1) necessarily raised, (2) actually disputed, (3) substantial, and  
21 (4) capable of resolution in federal court without disrupting the  
22 federal-state balance approved by Congress. Where all four of these  
23 requirements are met . . . jurisdiction is proper because there is a  
“serious federal interest in claiming the advantages thought to be  
inherent in a federal forum,” which can be vindicated without  
disrupting Congress’s intended division of labor between state and  
federal courts.

24                   *Gunn v. Minton*, 568 U.S. 251, 258 (2013) (citation omitted).

25                   Here, Defendants cannot establish federal question jurisdiction over Plaintiff’s claims  
26 because Plaintiff does not raise a necessary or substantial question of federal law.

#### 27                   1. Necessity

28                   Neither of Plaintiff’s claims necessarily turns on a question of federal law.

1 Plaintiff's wrongful termination claim "arises under the public policies of the State of  
2 California and the United States, and Ericsson's retaliation against Plaintiff and ultimate  
3 termination of her employment was in violation of such policies, including those set forth in  
4 Sarbanes Oxley Act of 2002 *and related statutes and regulations prohibiting fraud against*  
5 *shareholders and misreporting financial data to shareholders*, those set forth in the FEHA, and  
6 related statutes and regulations prohibiting discrimination, harassment and retaliation due to age,  
7 gender, and disability." Compl. ¶ 29 (emphasis added). Similarly, Plaintiff's Section 1102.5  
8 whistleblower claim alleges that "Plaintiff engaged in protected activity under the Labor Code by  
9 complaining to Ericsson, including her manager and to those who could correct the illegalities  
10 about their FEHA violations, SOX violations and other illegal conduct." Compl. ¶ 34.

11 Thus, Plaintiff alleges her termination violated public policy both because it was  
12 discriminatory on the basis of gender and also because it constituted retaliation for blowing the  
13 whistle on securities fraud. And she alleges retaliation under § 1102.5 for reporting violations of  
14 both state law (FEHA), federal law (SOX), and other unspecified "illegal conduct."

15 Usually, "[w]hen a claim can be supported by alternative and independent theories—one of  
16 which is a state law theory and one of which is a federal law theory—federal question jurisdiction  
17 does not attach because federal law is not a necessary element of the claim." *Rains v. Criterion*  
18 Sys., Inc., 80 F.3d 339, 346 (9th Cir. 1996). It is not clear whether the alternative theories  
19 underlying a state law claim must further substantively similar public policies. For example, in  
20 *Rains*, the plaintiff alleged wrongful discharge that violated the public policy underlying both  
21 FEHA and Title VII. The Ninth Circuit held that alternative pleading did not create federal  
22 question jurisdiction over the wrongful discharge claim because "the complaint merely  
23 incorporates Title VII as one of several *similar* sources of public policy supporting defendant's  
24 state law claims." *Id.* at 344 (emphasis added). On the other hand, neither party has cited any  
25 case holding that absent similar sources of public policy, alternative bases do not suffice.

26 The Court need not resolve the question because, setting the FEHA allegations aside,  
27 California has "similar sources of public policy" to SOX's whistleblower protections. *Id.* at 344.  
28 Although Plaintiff's complaint refers only generally to other statutes, *see* Compl. ¶ 29 (referring to

1 SOX “and related statutes and regulations prohibiting fraud against shareholders and misreporting  
2 financial data to shareholders”), it is of no consequence that Plaintiff “did not refer . . . to a  
3 specific state statute . . . in his complaint.” *Campbell v. Aerospace Corp.*, 123 F.3d 1308, 1314  
4 (9th Cir. 1997) (where plaintiff alleged only that he was “terminated for ‘blowing the whistle’ on  
5 illegal activity of defendant . . . illegally billing the U.S. Air Force which is funded with  
6 taxpayers’ money” without identifying a particular statute, there was no necessary federal question  
7 under the federal False Claims Act because California’s Section 1102.5 provided similar  
8 protections for whistleblowers).

9 Here, SOX is intended to “protect investors by improving the accuracy and reliability of  
10 corporate disclosures made pursuant to the securities laws, and for other purposes.” Sarbanes-  
11 Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat 745 (2002). California law also prohibits the  
12 same kinds of fraudulent misrepresentations in the selling of securities. *See Cal. Corp. Code §*  
13 25401 (“It is unlawful for any person to offer or sell a security in this state, or to buy or offer to  
14 buy a security in this state, by means of any written or oral communication that includes an untrue  
15 statement of a material fact or omits to state a material fact necessary to make the statements  
16 made, in the light of the circumstances under which the statements were made, not misleading.”).  
17 Furthermore, SOX prohibits covered companies from retaliating against employees who “provide  
18 information . . . which the employee reasonably believes constitutes a violation of section 1341,  
19 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any  
20 provision of Federal law relating to fraud against shareholders.” 18 U.S.C. § 1514A(a)(1).  
21 Similarly, California Labor Code Section 1102.5 protects employees from retaliation for providing  
22 information “if the employee has reasonable cause to believe that the information discloses a  
23 violation of state or federal statute, or a violation of or noncompliance with a local, state, or  
24 federal rule or regulation, regardless of whether disclosing the information is part of the  
25 employee’s job duties.” Cal. Labor Code § 1102.5(b). Thus, California and the United States  
26 both have public policies against fraudulent misrepresentation in the sale of securities, as well as  
27 public policies against retaliation against employees who blow the whistle on such illegality.

28 For these reasons, Plaintiff’s wrongful discharge and § 1102.5 claims both plead an

1 alternative basis under state public policy. Resolution of a federal question is therefore not  
2 “necessary” for Plaintiff to prevail.

3       2.     Substantiality

4       Even if there were a “necessary” question, it would not be substantial. To determine if a  
5 federal question is “substantial,” “it is not enough that the federal issue be significant to the  
6 particular parties in the immediate suit,” but rather depends on “the importance of the issue to the  
7 federal system as a whole.” *Gunn*, 568 U.S. at 258.

8       In *Gunn*, for example, a plaintiff brought a state malpractice case against an attorney for  
9 his performance in patent litigation. The Supreme Court accepted that the malpractice claim  
10 would “necessarily require application of [federal] patent law to the facts of [the plaintiff’s] case.”  
11 *Id.* at 259. However, it found that the case was not significant to the federal system as a whole for  
12 several reasons, including “the backward-looking nature of a legal malpractice claim” that “would  
13 not change the real-world result of the prior federal patent litigation,” *id.* at 261, that permitting  
14 the case would not “undermine ‘the development of a uniform body of [patent] law’” because “the  
15 federal courts are . . . not bound by state court case-within-a-case patent rulings,” *id.* at 261-62,  
16 and that even if a state case raised “more novel questions of patent law . . . for the first time,” such  
17 questions “will at some point be decided by a federal court in the context of an actual patent case.”  
18 *Id.* at 262. Indeed, “[i]f the question arises frequently, it will soon be resolved within the federal  
19 system, laying to rest any contrary state court precedent; if it does not arise frequently, it is  
20 unlikely to implicate substantial federal interests.” *Id.* For those reasons, federal jurisdiction was  
21 not merited over the state law malpractice claim.

22       In contrast, cases where a substantial federal interest has been found involved issues like  
23 the federal government’s interest in being able to recover delinquent taxes, *see Grable & Sons*  
24 *Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 310-311 (2005) (finding federal  
25 jurisdiction over a state law quiet title action alleging that the IRS had failed to comply with  
26 federal notice requirements so that the seizure and sale of property were invalid), or whether the  
27 federal government’s issuance of bank bonds is unconstitutional, *see Smith v. Kansas City Title &*  
28 *Trust Co.*, 255 U.S. 180 (1921). In other words, they implicated the federal government’s powers

1 or its abilities to carry out some sort of nationwide program; often, the interest of having federal  
2 courts adjudicate the issue strengthens the claim of a substantial federal interest. *See, e.g., Grable,*  
3 at 545 U.S. at 315 (holding that “[t]he meaning of the federal tax provision [in a state quiet title  
4 action] is an important issue of federal law that sensibly belongs in a federal court” because it  
5 implicates “the ability of the IRS to satisfy its claims from the property of delinquents,” so the  
6 government “has a direct interest in the availability of a federal forum to vindicate its own  
7 administrative action”).

8 Defendants have not identified a similar federal interest here, and it is difficult to see one.  
9 This dispute is between private parties and, although Plaintiff’s claims arguably may involve a  
10 federal statute (at least under one alternate theory), they do not involve a substantial interest of the  
11 federal government that would be advanced by hearing the claim in this court. Defendants could  
12 not even identify an important statutory provision raising some dispute, *e.g.*, of statutory  
13 construction that would warrant a heightened interest in having a federal court adjudicate the  
14 matter.

15 To the contrary, there is an argument that hearing Plaintiffs’ claim could actually  
16 undermine federal interests. This case is similar to *Campbell v. Aerospace Corp.*, 123 F.3d 1308,  
17 1315 (9th Cir. 1997). There, the Ninth Circuit found that there was no federal interest in  
18 exercising federal jurisdiction over plaintiff’s state common law claim for wrongful termination  
19 even though it was arguably premised on a violation of the federal False Claims Act (FCA) insofar  
20 as it alleged retaliation for reporting billing practices defrauding the government. *Campbell*, 123  
21 F.3d at 1315. The court explained that the federal interest in exposing attempts to defraud the  
22 federal government was already well-served by the existing federal *qui tam* cause of action  
23 available under the FCA. *Id.* The FCA requires a plaintiff to satisfy certain procedural  
24 requirements before bringing a cause of action directly under the statute. *Id.* Allowing federal  
25 question jurisdiction over plaintiff’s state law claim under the FCA would thus create a  
26 “backdoor” and thereby “derogate the very detailed requirements Congress chose to impose on *qui*  
27 *tam* FCA litigants.” *Id.*

28 Similarly, here, Congress created a federal cause of action for whistleblowers under SOX,

1 the federal public policy implicated in Plaintiff's complaint. *See* 18 U.S. Code § 1514A(b)(1).  
2 Compliance with specific procedures is required by SOX: the plaintiff must first file a complaint  
3 with the Secretary of Labor and, if the Secretary of Labor has not made a final determination in  
4 the matter after 180 days, the complainant may then bring an action for *de novo* review in the  
5 district courts. *Id.* As in *Campbell*, allowing state law wrongful termination claims into federal  
6 court on the basis of alleged SOX violations could create a “backdoor” circumventing the SOX  
7 requirements to file an administrative claim with the Secretary of Labor before filing suit in  
8 district court. As in *Campbell*, exercising jurisdiction over this claim may undermine, not  
9 advance, federal interests.

10 In sum, Defendants do not show that Plaintiff's claims necessarily turn on resolution of a  
11 substantial federal question. Accordingly, federal question jurisdiction does not lie.

12 B. Diversity Jurisdiction

13 Defendants also assert diversity jurisdiction. *See* Notice of Removal at ¶ 9. To establish  
14 diversity jurisdiction, Defendants must show the amount in controversy exceeds \$75,000 and  
15 plaintiffs and defendants are completely diverse (citizens of different states). 28 U.S.C.A. §  
16 1332(a).

17 1. Amount in Controversy

18 The amount in controversy requirement is satisfied unless it is a “legal certainty” that it  
19 cannot be met. *Saint Paul Mercury Indemnity Co v. Red Cab Co.*, 303 U.S. 283, 288 (1938).  
20 Here, Defendants estimate total damages alleged by Plaintiff at “a conservative minimum of  
21 \$180,555.” Notice of Removal at ¶ 27. Plaintiff does not contest the amount in controversy. The  
22 estimate is reasonable because Defendants calculate that Plaintiff would be owed \$84,967.42 in  
23 back pay alone if she was in fact wrongfully terminated. Quazi Decl. at ¶ 8. Thus, the amount in  
24 controversy requirement is satisfied.

25 2. Diversity

26 Therefore, diversity jurisdiction turns on the citizenship of the parties. Plaintiff is a  
27 California citizen. Compl. at ¶ 4. The citizenship of Defendants is as follows.

28 **Ericsson, Inc.:** Defendant Ericsson, Inc. is a Delaware corporation with its principal place

1 of business in Texas. Quazi Decl. at ¶ 3. Therefore, there is diversity between Plaintiff and  
2 Defendant Ericsson, Inc.

3 **Doe Defendants:** Doe Defendants are ignored for diversity purposes. *See* 28 U.S.C.A. §  
4 1441(b) (“In determining whether a civil action is removable on the basis of the jurisdiction under  
5 section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be  
6 disregarded.”).

7 **EUS, Inc:** EUS, Inc. is a “d/b/a”, or doing business as, of Ericsson, Inc. Quazi Decl. at ¶  
8 4. “The designation ‘d/b/a’ is merely descriptive of a corporation that does business under some  
9 other name and does not create a distinct corporate entity.” *Trustees of Const. Indus. & Laborers*  
10 *Health & Welfare Tr. v. C & W Enterprises, Inc.*, 298 F. App’x 566, 567 (9th Cir. 2008).  
11 Therefore, EUS, Inc. shares Ericsson, Inc.’s state citizenship and is a citizen of Texas. Quazi  
12 Decl. at 4. Thus, there is diversity between Plaintiff and EUS, Inc.

13 **Pachouri:** Crucially, Defendant Sanuj Pachouri is a California citizen. Compl. at ¶ 6.  
14 Therefore, on the face of Plaintiff’s pleadings, there is incomplete diversity between Plaintiff and  
15 Defendants because Pachouri and Plaintiff share California citizenship. If Pachouri’s citizenship  
16 must be taken into account, then there is no diversity jurisdiction over Plaintiff’s case.

17 a. Fraudulent Joinder

18 However, Defendants argue Pachouri was fraudulently joined and should therefore not be  
19 considered for diversity purposes. *See* Notice of Removal at ¶ 13. The test for fraudulent joinder  
20 is stringent. A federal court must find that a defendant was properly joined and remand the case to  
21 state court ““if there is a *possibility* that a state court would find that the complaint states a cause  
22 of action against any of the [non-diverse] defendants.”” *Grancare, LLC v. Thrower by & through*  
23 *Mills*, 889 F.3d 543, 548 (9th Cir. 2018) (quoting *Hunter v. Philip Morris USA*, 582 F.3d 1039,  
24 1046 (9th Cir. 2012)) (emphasis in original). Fraudulent joinder is appropriate, *e.g.*, when a  
25 plaintiff’s claims are precluded by a statute of limitations or a defendant’s actions are privileged.  
26 *Id.* The Court should not find fraudulent joinder when a “defendant raises a defense that requires  
27 searching inquiry into the merits of the plaintiff’s case, even if that defense, if successful, would  
28 prove fatal.” *Id.* at 548-49. When evaluating a claim of fraudulent joinder, “the district court must

1 consider . . . whether a deficiency in the complaint can possibly be cured by granting the plaintiff  
2 leave to amend.” *Id.* at 550. If the plaintiff could cure this deficiency by amending his or her  
3 complaint, then fraudulent joinder does not obtain.

4 Plaintiff initially alleged four claims against Pachouri: wrongful termination, violation of  
5 California whistleblower law, false promise, and intentional infliction of emotional distress. Each  
6 is discussed below.

- i. Wrongful Termination and Violation of California Whistleblower Law

9 Plaintiff first two claims against Pachouri are precluded by law: only employers are liable  
10 for tortious wrongful discharge and violations of state law whistleblower protections, not  
11 employees or individual supervisors. *See Jacobs v. Universal Development Corp.*, 53 Cal. App.  
12 4th. 692, 697 (1997) (“only an employer, and not individual employees, may be liable for tortious  
13 discharge”); *Tillery v. Lollis*, No. 1:14-CV-202025-KJM, 2015 WL 4873111, at \*10 (E.D. Cal.  
14 Aug. 13, 2015) (state whistleblower protections do not create individual liability). These claims  
15 do not pass muster under the fraudulent joinder standard; indeed, they were subsequently removed  
16 in Plaintiffs’ First Amended Complaint.

ii. Manager's Privilege (Common Defense to False Promise and Intentional Infliction of Emotional Distress)

Two of Plaintiff's claims against Pachouri remain: false promise and intentional infliction of emotional distress.

Defendants argue both claims should be precluded by the manager's privilege, a common law doctrine "designed to further certain societal interests in fostering uninhibited advice by agents to their principals." *L.A. Airways, Inc. v. Davis*, 687 F.2d 321, 327 (9th Cir. 1982). Asserting the privilege, "a manager or agent may, with impersonal or disinterested motive, properly endeavor to protect the interests of his principal by counseling the breach of a contract with a third party which he reasonably believes to be harmful to his employer's best interests" without incurring liability in tort. *Olivet v. Frischling*, 104 Cal. App. 3d 831, 840–41 (Ct. App. 1980), disapproved of on other grounds by *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7

1 Cal. 4th 503, 869 (1994).

2 Defendants misapply the manager's privilege to Plaintiff's false promise and IIED claims.  
3 The overwhelming weight of authority has refused to apply the privilege to preclude claims that  
4 do not arise out of the conduct involved in a business tort of interference with contractual  
5 relations. *See Hernandez v. Ignite Rest. Grp., Inc.*, 917 F. Supp. 2d 1086, 1091 (E.D. Cal. 2013)  
6 (surveying California cases and finding almost no examples of a state or federal court applying the  
7 manager's privilege to *any* tort other than intentional interference with a contractual relationship).  
8 Many district courts have expressly refused to extend the privilege to other tort claims. *See also*  
9 *Webber v. Nike USA, Inc.*, No. 12-CV-00974 BEN WVG, 2012 WL 4845549, at \*4 (S.D. Cal.  
10 Oct. 9, 2012) ("IIED is outside the scope of the managerial privilege."); *E.E.O.C. v. Interstate*  
11 *Hotels, L.L.C.*, No. C 04-04092 WHA, 2005 WL 885604, at \*2 (N.D. Cal. Apr. 14, 2005)  
12 (allegations of harassment and discrimination fall outside the manager's privilege). The  
13 manager's privilege does not preclude Plaintiff's claims.

14                   iii.     False Promise

15 False promise requires proving the elements of a fraud claim. *Lazar v. Superior Court*, 12  
16 Cal. 4th 631, 638 (1996). "The elements of fraud or deceit . . . are: a representation, usually of  
17 fact, which is false, knowledge of its falsity, intent to defraud, justifiable reliance upon the  
18 misrepresentation, and damage resulting from that justifiable reliance." *Stansfield v. Starkey*, 220  
19 Cal. App. 3d 59, 72–73 (Ct. App. 1990) (citation omitted).

20 Defendants argue that Plaintiff's false promise claim, as a fraud claim, must be pled with  
21 particularity. *Stansfield*, 220 Cal. 3d. at 73 (fraud requires pleading facts that show how, when,  
22 where, to whom, and by what means false representations were made). Defendants are also  
23 correct that Plaintiff's pleading is deficient: she does not allege with specificity precisely when  
24 and by what means Defendant Pachouri made false representations to her. Compl. at ¶43.  
25 However, the Court cannot say that Plaintiff could not amend her complaint to plead with  
26 additional specificity. 889 F.3d at 550.

27                   However, even if Plaintiff pleads with greater specificity, she would not be entitled to  
28 relief for another reason: she has not alleged a cognizable harm. Plaintiff alleges that, as a result

1 of Defendants' false promises, she did not look for new work. Compl. at 10. But looking for a  
2 job is several steps removed from a tangible harm; the harm is "speculative, remote, contingent or  
3 merely possible," rather than reasonably certain. *Toscano v. Greene Music*, 124 Cal.App.4th 685,  
4 694 (2004); *cf. Grupe v. Glick*, 26 Cal.2d 680, 693 (1945) ("[W]here the operation of an  
5 unestablished business is prevented or interrupted, damages for prospective profits that might  
6 otherwise have been made from its operation are not recoverable for the reason that their  
7 occurrence is uncertain, contingent and speculative."). Plaintiff does not allege, for example, that  
8 she received a job offer but turned it down—and her own allegations would appear to foreclose  
9 that possibility as she engaged in no search at all. This case contrasts with *Miller v. Fairchild  
10 Industries, Inc.*, 885 F.2d 498, 509-10 (9th Cir. 1989) (plaintiffs signed settlement agreements  
11 with their employer forgoing their right to sue for employment discrimination under Title VII in  
12 exchange for additional training opportunities; their employer knew, but did not disclose, that  
13 plaintiffs were likely candidates for layoffs, creating grounds for a false promise claim because the  
14 layoff denied them the promised benefit of the settlement training).

15 b. Intentional Infliction of Emotional Distress (IIED)

16 Plaintiff also brings an IIED claim based, *inter alia*, on allegations that Pachouri engaged  
17 in "rude, bullying behavior toward Plaintiff and other females," "made a point to refuse to shake  
18 Plaintiff's hand," and "repeatedly excluded Plaintiff from work events." Compl. at ¶ 20. She calls  
19 his conduct "despicable and outrageous," "malicious and oppressive," and intended to cause (and  
20 in fact causing) severe emotional distress. *Id.* at ¶ 48. In her Reply, she reiterates these pleadings,  
21 alleging "bullying, ridicule, false accusations, and harassment . . . beyond all bounds of decency."  
22 Reply at 7.

23 Defendants argue that Plaintiff does not plead sufficient specific facts supporting her IIED  
24 claim. Mot. to Dismiss Pl.'s First Am. Compl. at 12. But under the permissive fraudulent joinder  
25 standard, inadequate specificity in the pleadings is not grounds for fraudulent joinder because she  
26 could "possibly" amend the complaint to be more specific. *Grancare*, 889 F.3d at 550; *see also*  
27 *Tuttle v. Wells Fargo Bank, N.A.*, No. 18-CV-01544-JCS, 2018 WL 2412289, at \*5 (N.D. Cal.  
28 May 29, 2018) (holding that the fraudulent joinder standard was not met where a claim could be

1 dismissed “with leave to amend, not with prejudice” because it would require “reviewing multiple  
2 rounds of amended pleadings . . . cross[ing] the line from [a] threshold inquiry to instead presiding  
3 over a dispute under state law”). Plaintiff could possibly allege with more specificity, for instance,  
4 precisely what acts constituted “bullying” or “harassment.”

5 Defendants also argue Plaintiff’s IIED claim is precluded by the workers’ compensation  
6 program. Mot. to Dismiss Pl.’s First Am. Compl. at 11. In *Miklosy v. Regents of Univ. of Cal.*, 44  
7 Cal. 4th 876, 903 (2008), the California Supreme Court held that plaintiffs who alleged they were  
8 wrongfully terminated whistleblowers could not sue for IIED outside of the workers’  
9 compensation program, because the program is the exclusive remedy for workplace injuries. In  
10 *Yau v. Santa Margarita Ford, Inc.*, 229 Cal. App. 4th 144 (2014), the Court of Appeal broadly  
11 construed *Miklosy* to preclude any IIED claim predicated on a wrongful termination in violation of  
12 public policy. *Yau*, 229 Cal. App. 4th at 156 (2014). Notably, the IIED claims in *Yau* and *Miklosy*  
13 were premised on alleged violations of California whistleblower protections; neither court  
14 considered whether IIED could proceed on the basis of alleged FEHA violations, as Plaintiff has  
15 asserted here.

16 The California Court of Appeals has subsequently held that IIED claims may still be  
17 premised on FEHA violations without running afoul of the workers’ compensation doctrine. *See*  
18 *Light v. Cal. Dep’t of Parks & Recreation*, 14 Cal. App. 5th 75, 99 (2017). Under *Light*,  
19 Plaintiff’s IIED claim against Pachouri could “possibly” succeed because she alleges  
20 discrimination under FEHA and also harassment. *See also Nazir v. United Airlines, Inc.*, 178 Cal.  
21 App. 4th 243, 288 (2009) (“Neither discrimination nor harassment is a normal incident of  
22 employment.”). She alleges Pachouri personally engaged in “rude and bullying behavior” and  
23 “harassment” of her and other women; though this is a vague and conclusory allegation, vagueness  
24 can theoretically be cured through amendment and more specific pleadings; vagueness is not  
25 necessarily enough to merit a finding of fraudulent joinder. *See Tuttle, supra*. In this case,  
26 Plaintiff has explicitly alleged specific examples of differential treatment of women, such as  
27 “refus[ing] to offer Plaintiff additional training for career growth, as such was offered to male  
28 employees, lied to Plaintiff that she would not be receiving a raise because no one was receiving

1 raises when Ericsson did, in fact, give male employees raises, . . . focused on the career growth  
2 and opportunities for male employees, but not for Plaintiff and other female employees, . . . [and]  
3 provided special assistance to male employees in obtaining certifications not provided to female  
4 employees.” Compl. ¶ 20. This alleged atmosphere of differential treatment makes it more  
5 possible that if Plaintiff more specifically alleges acts of harassment or bullying, she can possibly  
6 link it to gender bias. Thus, with respect to this claim, under the foregoing standard applicable  
7 here, Plaintiff did not fraudulently join Pachouri.

8 Because Plaintiff’s IIED claim against Pachouri survives, he must be considered for  
9 diversity jurisdiction. As Pachouri and Plaintiff are both citizens of California, there is no  
10 complete diversity, and the Court lacks diversity jurisdiction.

11 **IV. CONCLUSION**

12 The Court lacks federal subject matter jurisdiction. Resolution of Plaintiff’s state law  
13 claims does not necessarily raise a substantial federal question. Defendants have not demonstrated  
14 diversity jurisdiction because they have not demonstrated that none of Plaintiffs’ claims against  
15 Defendant Pachouri could “possibly” succeed. This case must be **REMANDED** to the Superior  
16 Court. In light of the remand, Defendants’ motion to dismiss is **DENIED** as moot.

17 This order disposes of Docket Nos. 13 and 19. The Clerk is ordered to remand the case to  
18 Alameda County Superior Court and to close the case.

19  
20 **IT IS SO ORDERED.**

21  
22 Dated: August 1, 2018

23  
24  
25   
EDWARD M. CHEN  
United States District Judge